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No. 92-1361

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BILL ARMONTROUT, et al.,
Petitioners,

VS.

MICHAEL BURTON, et al.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a federal court have jurisdiction to grant injunctive relief when the individual defendants have received a directed verdict in their favor as to damages only (with no specific finding that they did not violate the Constitution), or a general jury verdict in their favor (with no specific finding that the defendants did not violate the Constitution)?

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's opinion in this case. That opinion is reported at *Burton v. Armontrout*, 975 F.2d 543 (8th Cir. 1992).

STATEMENT OF THE CASE

The respondents are inmates and former inmates of the Jefferson City Correctional Center (JCCC), formerly known as the Missouri State Penitentiary. The petitioners are current and former prison officials.

In June and July of 1987, the respondents were involved in a massive cleanup of sewage which caused flooding several times

at the JCCC hospital (II App. 25-29, App. 039-041). The inmates were required to work in raw sewage in order to repair blocked or leaking sewer lines and in cleaning the sewage and water from the floor of the hospital which had overflowed from the sewage lines (Tr. 3-101, 3-104). The inmates were exposed to dangerous communicable diseases, including AIDS, because of their work in the raw sewage of patients at the hospital who had AIDS or had tested HIV positive, or had other communicable diseases. None of the inmates were warned by prison officials of the potential health hazards or life-threatening risks involved in working in the sewage, nor were they given adequate protective clothing by officials. Each of the inmates had open wounds, cuts or bruises which were exposed to the contaminated sewage and water during the cleanup.

The prison officials knew during these cleanup incidents that the sewage water was contaminated with viruses from AIDS patients, HIV positive patients, and patients with other infectious diseases (II App. 26-28, 30-41). The inmates were not aware that the sewage came from the second floor of the hospital where at least one AIDS patient and patients with other communicable diseases were housed until July 7, 1987, when one of the inmates found a memo written on June 10, 1987, but never distributed, by one of the officials, Marilyn Butts, indicating that the sewage probably caused a substantial risk (App. 041, II App. 28-29).

Laboratory technician Steven Howard testified that he worked at the laboratory of the hospital for thirteen years and that there were HIV positive patients on the second, third, and fourth floors of the hospital. He also indicated that there were HIV positive patients in June of 1987 on the second floor of the hospital, as well as patients with other infectious diseases such as tuberculosis, hepatitis, and others (I Tr. 79-80).

Dr. David M. Tarlow testified as an expert at the trial, and was the only doctor who had interviewed the inmates, reviewed their

medical charts, prepared interview forms regarding their symptoms, and gave a medical opinion concerning their emotional state of mind and physical changes (Tr. 2-102). He also testified that hospital workers take quite extensive precautions when working with AIDS and hepatitis patients, such as wearing gowns, double gloves, boots, and masks, as is done with all high-risk patients (Tr. 2-85). He further testified that medical evidence supports that the AIDS virus can be transmitted through any body fluid, including semen, saliva, tears, feces, and urine (Tr. 2-86).

Prison official Marilyn Butts, also a defendant in the case, testified that she was Director of Nursing in June and July of 1987 at the prison hospital, and recalled that there was one HIV positive patient on the second floor of the hospital and other patients who were acute (Tr. 2-10). She also stated that the sewage problem was "potentially maybe a health risk to everyone that was there" (Tr. 2-27).

William J. Kaplan, who was policy coordinator at the JCCC, testified that as of the time of trial there were no policies or procedures specifically addressing procedures pertaining to the manner in which inmates and civilian personnel were to unstop sewer lines or clean up (Tr. 2-38). There were no guidelines or procedures as to how inmates were to protect themselves in a dangerous situation where health risks were involved (Tr. 39).

Only gloves and rubber boots were available for use by the inmates in 1987 when the exposure to the contaminated sewage occurred (Supp. Tr. 2-14, Tr. 3-6 to 3-8). Three years later, at the time of trial in 1990, the only equipment still available to inmates working in hazardous conditions consisted of 8 pairs of rubber boots, 4 face shields, a box of 100 surgical masks, and rubber gloves (unknown number) (Tr. 2-50). None of the items would protect from overhead sewage (Tr. 2-51).

There were as many as thirty (30) inmates who were involved in the sewage cleanup in June and July of 1987 (Tr. 2-7). Thus,

not only was the equipment provided by prison officials inadequate as of 1987, but even three (3) years later in 1990, at the time of trial, there was still not sufficient protective gear and no policies in place to provide for protection of inmates working in hazardous conditions.

At the end of plaintiffs' case, the district court directed verdicts in favor of defendants Armontrout, Moore, Lombardi, Wieburg, Gately, Hanauer, Borghart, Bauman, and Neal, as to damages only, and withheld ruling on injunctive relief until after the trial. Magistrate Knox did not enter a finding that there was no constitutional violation — only a ruling as to damages. Only the constitutional violations of defendants Bowers, Stout, Butts, and Haggart were before the jury and decided by the jury. During the trial, the court heard additional evidence outside the presence of the jury on the issue of injunctive relief only (Tr. 2-72 to 2-81). Herschell Larimore, a maintenance supervisor at JCCC, testified on the issue of injunctive relief related to the continued failure of the defendants to provide adequate protection and warnings subsequent to the original incidents which occurred in June and July of 1987. The verdict only related to defendants Bowers, Stout, Butts, and Haggart. Defendants Armontrout, Moore, Lombardi, Wieburg, Gately, Hanauer, Borghart, Bauman, and Neal, whose verdicts were directed, were the persons primarily responsible for maintaining protective clothing for inmate workers.

The court recognized that raw sewage presents potential health hazards and that adequate protective clothing and warnings are necessary to protect inmates, and ordered the appropriate, very minimal, injunctive relief against the prison officials. The court entered its injunctive relief, knowing it had jurisdiction to do so because in the original complaint of Michael Burton, et al., the plaintiffs requested in paragraphs 16 and 31 injunctive relief to prevent irreparable injuries of the past and in the future (II App. 8, App. 034-044). *See Freeman v. Pitts*, 112 S.Ct. 1430 (1992).

REASONS WHY THE WRIT SHOULD BE DENIED

The Eighth Circuit's holding that injunctive relief was permissible despite verdicts in favor of state officials is not contrary to decisions of this Court and not unprecedented expansion of federal court jurisdiction.

The Eighth Circuit's holding that injunctive relief was permissible despite verdicts in favor of state officials is based on a particular set of facts and circumstances wherein general verdicts were issued by the jury which did not specifically set forth whether a lack of a constitutional violation was found. Further, the directed verdicts were entered against the other defendants as to damages only. No finding of lack of constitutional violation was made. In addition, the judge heard additional evidence outside the presence of the jury on the issue of continuing and future harm to plaintiffs for the purpose of considering injunctive relief.

The facts and law of this case permit injunctive relief. The decision of the Eighth Circuit to grant injunctive relief on the particular set of facts in this case does not conflict with decisions of this Court, does not expand federal jurisdiction or unnecessarily interfere with state officials, and does not violate the Seventh Amendment.

I. Federal courts possess jurisdiction to grant injunctive relief absent a finding of constitutional liability.

As the Eighth Circuit's opinion in this case pointed out, courts have broad discretionary power to order injunctive relief. *Burton v. Armontrout*, 975 F.2d 543 (8th Cir. 1992) (citing *Taylor Bay Protective Ass'n v. Administrator, United States E.P.A.*, 884 F.2d 1073, 1079 (8th Cir. 1989). The grant or denial of injunctive relief lies within the discretion of the district court and such decision will be reversed only if the court relied on an erroneous legal premise or otherwise abused its discretion. *Chalk v. U.S.*

Dist. Court, 840 F.2d 701 (9th Cir. 1988). "In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow. Moreover, in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable. In equity as nowhere else courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding those interests may have constitutional roots." *Lemon v. Kurtzman*, 93 S.Ct. 1463, 1469 (1973). As the Eighth Circuit's opinion also indicated, courts may grant injunctive relief despite a jury's determination that defendants are not liable for damages. *Burton* at 545 (citing *Johnson v. Bowers*, 884 F.2d 1053, 1056 (8th Cir. 1989). A showing of specific money damage is not necessary to support an injunction. *Gilbrech v. Kloberdanz*, 107 N.W.2d 547 (1961).

In ordering injunctive relief, a court must do so in light of all the facts and circumstances in a case, *Keco Indus., Inc. v. Laird*, 318 F.Supp. 1361 (D.C.D.C. 1970) and a court exercises power and control over the entry of a judgment on a verdict to the extent of determining what is the appropriate judgment to be rendered in accordance with the jury's verdict. *Wilson v. Eberle*, 18 F.R.D. 7 (1955). A court may rely on evidence not presented to the jury when the jury's factual findings are incomplete or inconclusive. *Burton* at 545, citing *Charles Jacquin Et Cie, Inc. v. Destileria Serralles, Inc.*, 921 F.2d 467, 472 (3d Cir. 1990).

The main virtue of an injunction is to anticipate and prevent threatened wrongs, and a remedy which prevents a threatened wrong is better than one which provides for the payment of possible damages caused thereby. *Zimmerman v. Philjon, Inc.*, Pa., 368 A.2d 694 (1977). Courts should get involved in granting injunctive relief when the threat of a constitutional violation is both real and immediate. *Rogers v. Scurr*, 676 F.2d 1211 (1982). Accordingly, in a civil rights action, plaintiffs are entitled to a

permanent injunction where there exists some cognizable danger of recurrent violation. *Green v. Williams*, 541 F.Supp. 863 (E.D. Tenn. 1981). Also, in prison situations, when there exists a threat of future inhumane conditions of confinement, injunctive relief should be granted. *DeGidio v. Pung*, 704 F.Supp. 922 (D. Minn. 1989). Forcing inmates to work in a shower of human excrement without protective clothing and equipment would be "inconsistent with any standard of decency." *Fruit v. Norris*, 905 F.2d 1147 (8th Cir. 1990).

Further, the fact that no or few cases have granted the precise relief sought under similar circumstances is not a controlling reason for refusing the relief. Otherwise, courts would often find themselves powerless to grant adequate relief, solely because the precise question had never arisen. *First Nat. Exchange Bank v. Hughson*, 74 S.E.2d 797 (1953). Nor is the mere fact that a case is new or novel and is not brought plainly within the limits of some adjudged case enough to preclude equity from taking jurisdiction. *Texas & P.R. Co. v. Rigsby*, 241 U.S. 33 (1916).

In this case, the district court evaluated additional evidence which was not before the jury, bearing on the granting of injunctive relief to prevent future harm. The evidence demonstrated a continuing policy by prison officials of ignoring the rights of inmates and guards to be protected from potential health hazards. The JCCC officials continued in their failure to warn inmates and guards of the danger of working in raw sewage and to provide adequate protective clothing to protect them, despite the passage of three years and increased awareness of the dangers of AIDS.

The additional testimony was heard by the court outside the presence of the jury from Herschell Larimore, a maintenance supervisor at the JCCC (Tr. 1-72 to 2-81). Mr. Larimore testified that as of March, 1990, neither civilians nor inmates were warned prior to repairing the plumbing of AIDS positive inmates

that they were working in the raw sewage of inmates who were AIDS patients or that protective clothing was necessary. William Kaplan, policy coordinator at JCCC, also testified that he knew of no written policies in effect presently or in June and July of 1987 which set forth the protective measures and clothing necessary for inmates to utilize when working in raw sewage or other dangerous conditions. Further, testimony from Donald Bax, maintenance supervisor at JCCC, indicated that there were still no policies in place regarding warning inmates or civilians prior to working in sewers or toilets of AIDS inmates (Tr. 2-53, 54), and that inmates were receiving written violations from prison officials if they refused to work in the areas where AIDS inmates were housed, even if the inmates had open sores.

Many authoritative health and medical documents were introduced into evidence during the main case indicating the extreme health and safety hazards of exposure to the body fluids of HIV positive persons, including raw sewage (Ex. 39-46). The American Red Cross and U.S. Public Health Services exhibit stated: "Be careful to protect him or her from contact with body fluids which may carry the AIDS virus. Body fluids include blood, semen, urine, feces, saliva, and vaginal secretions" (Ex. 41). Another U.S. Public Health Services exhibit indicated: "The Public Health Service has outlined instructions for hospital workers who care for AIDS patients. The most important PHS recommendation is that people who care for AIDS patients avoid direct contact with their skin or mucous membranes, with blood and bloody fluids of patients with AIDS or AIDS-related disorders. Urine, feces, body secretions, and open wounds are likely to contain blood that harbors the AIDS virus. Wear gloves when handling blood specimens, blood soiled items, body fluids, excretions and secretions, as well as surfaces, materials, and objects contaminated with these fluids. Wear coverall gown when clothing may be exposed to body fluids, blood secretions or excretions (Ex. 44). Testimony was received from Eddie Headrick, who testified as an expert for the petitioners, admitting

that these exhibits were acceptable and authoritative (Tr. 3-17, 3-20). An exhibit from the U.S. Department of Health and Human Services, Public Service, Center of Disease Control stated that "The time between an infection with the HGLV-3 virus and the onset of symptoms seems to range from about six months to five years or more.:. Symptoms of illness appear in approximately 30 percent of the individuals within five years of infection (Ex. 42, p.2).

Further, respondents provided evidence as part of their proposed findings of fact and conclusions of law showing that as of October, 1990, the Missouri State Penitentiary had new procedures for disposal of hazardous waste, but still provided no guidelines for the protection of the workers handling said waste (App. 181-186). Also, Occupational Safety and Health Administration instructions for handling body fluids of HIV positive and hepatitis B patients were in existence and available to prison officials to implement, but they had not done so (Attachment to proposed findings, App. 187-211).

Clearly, there is sufficient evidence from the medical community to indicate the potential life-threatening risks of exposure to raw sewage, and particularly the raw sewage of AIDS patients. And, clearly, there is evidence pointing to the continuing lack of response by the prison officials to the health hazards posed to inmates from working in such hazardous conditions. The district court and court of appeals in this case realized these facts and granted the appropriate injunctive relief to guard against such blatantly lax attitudes on the part of the prison officials to protect inmates from such life-threatening risks. The additional evidence heard and factual findings ascertained by the district court on the issue of injunctive relief properly supplemented the jury's general verdict, and the court of appeals properly affirmed the injunctive relief, keeping in mind that "equitable remedies are a special blend of what is necessary, what is fair, and what is workable." *Burton* at 545, quoting *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973).

II. The injunction granted does not unnecessarily interfere with state officials

The Supreme Court has asked for abstention of interference with administration of correctional institutions by the courts only when the practice does not offend a fundamental constitutional guarantee; otherwise, the courts must discharge their duty to protect constitutional rights. *Procunier v. Martinez*, 94 S.Ct. 1800 (1974). Although courts may not impose their own views of enlightened correctional policy on state correctional authorities, the deference accorded to correctional staffs is not absolute and inmates may not be confined in unsafe conditions. *Baker v. Holden*, 787 F.Supp. 1008 (D. Utah 1992), *Estelle v. Gamble*, 429 U.S. 97 (1976). While federal courts continue to recognize broad discretion required for state prison officials to maintain orderly and secure institutions, jails are constitutionally obligated to provide reasonably adequate sanitation for their inmates. *Fambro v. Fulton County, Ga.*, 713 F.Supp. 1426 (N.D. Ga. 1989). Courts must avoid becoming enmeshed in the minutiae of prison operations unless objective assessment of the prison conditions compels conclusion that inmates are being subjected to unreasonable safety risks. *Coniglio v. Thomas*, 657 F.Supp. 409 (S.D. NY 1987). A court's deference to administrative expertise and discretionary authority of correctional officials must be schooled, not absolute. *Williams v. Lane*, 851 F.2d 867 (7th Cir. 1988), *cert. denied*, 488 U.S. 1047.

Further, minimally intrusive relief against prison practices may assume the form of an order enjoining the continuation of practices, policies, or conditions adjudged constitutionally infirm. *Kendrick v. Bland*, 740 F.2d 432 (6th Cir. 1984). Simply because the constitution does not require a State Department of Corrections to provide inmates with certain items does not mean that it is inappropriate for a district court to order them in the course of fashioning a remedy. *Gluth v. Kangas*, 951 F.2d 1504 (9th Cir. 1991). In determining the constitutional validity of a

prison regulation or policy, the Court of Appeals focuses its inquiry on the legitimacy of the policy as a whole. *Blankenship v. Gunter*, 898 F.2d 625 (8th Cir. 1990). The United States, via the Bureau of Prisons, must exercise ordinary diligence in keeping prisoners safe and free from harm. *Artis v. Petrovsky*, 638 F.Supp. 51 (W.D. Mo. 1986). Additionally, courts must take into consideration the cost of compliance with an injunction when ordering relief. *Toussaint v. McCarthy*, 597 F.Supp. 1388, 1419 (N.D. Cal. 1984) (citing *Hoptowit v. Ray*, 682 F.2d 1237, 1247 (9th Cir. 1982) and *Wright v. Rushen*, 642 F.2d 1129, 1134 (9th Cir. 1981).

Here, the district court and court of appeals concluded that even though common sense suggests a person should have knowledge that unprotected contact with human waste can cause disease, the JCCC officials responsible for conditions at the prison took no steps to provide adequate protective clothing or warnings to inmates. The injunction ordered could not be any less intrusive or costly on the prison officials. The term "sufficient numbers" (of rubber boots, rubber gloves, leather gloves, surgical masks, and face shields ordered by the injunction) is not indefinite or difficult to understand, as the petitioners assert. Clearly, "sufficient numbers" requires that the officials keep on hand enough of the designated protective gear for as many numbers of prisoners they request to work in raw sewage. As the petitioners indicate, the prison officials already possessed much of the protective gear; they merely were required to add items in sufficient quantities to insure the reasonable protection of their inmates by making sure each inmate required to work in raw sewage had warning of the risks involved and protective items to wear.

Additionally, considering the magnitude of the potential health hazards and life-threatening risks inherent in working in raw sewage, the permanent warning regarding the necessity of wearing protective clothing while working in raw sewage required to

be posted by the injunction is certainly not unreasonable, costly, or intrusive. The petitioners indicate that the injunction interferes with state officials and forever subjects state officials, and their successors, to "unnecessary risks" of being held in contempt if they should fail to comply with the mandatory injunction. Surely, requiring inmates to work in raw sewage unprotected and without warning of potential hazards presents more "unnecessary risks" and outweighs the concerns of prison officials of being held in contempt.

The district court and court of appeals realized that this injunction was necessary to prevent extreme health risks and possible death to inmates, and that such a measure was called for because the prison officials had not taken it upon themselves to adopt the needed, basic policies to protect their prisoners. The injunctive relief was not intrusive in terms of its requirements or costs and did not place substantive restrictions on the exercise of discretion by prison officials.

III. The injunctive relief granted does not violate the prison officials' Seventh Amendment rights.

In ordering injunctive relief, a court may rely on evidence not presented to the jury when the jury's factual findings are incomplete or inconclusive. *Burton*, *supra* at 545 (citing *Charles Jacquin Et Cie, Inc. v. Destileria Serralles, Inc.*, *supra* at 472. In matters tried in a federal district court without a jury, the judge is the trier of the facts and occupies a dual position in that he performs the function of the court in determining the applicable law and the function of a jury in determining the ultimate pertinent facts. *Anthony v. Louisiana & A. Ry. Co.*, 316 F.2d 858 (8th Cir. 1963), *cert. denied*, 375 U.S. 830. The court occupies the same relation to the facts in the case that a jury would have if the issue had been tried by the jury. *Dierks Lumber & Coal Co. v. Barnett*, 221 F.2d 695 (8th Cir. 1955).

The trial judge is the judge of the credibility of the witnesses, *Carlisle v. M/S Sistina*, 407 F.2d 824 (5th Cir. 1969), and the weight of the evidence. *Anthony v. Louisiana & A. Ry. Co., supra*. He may draw necessary and obvious inferences from the evidence just as jurors may in a trial before a jury. *Saturn Oil & Gas Co. v. Northern Natural Gas Co.*, 359 F. 2d 297 (8th Cir. 1966). Where the evidence is conflicting or is such that reasonable persons may honestly draw different inferences, it is for the court, as the trier of facts, to determine what inferences shall be drawn. *Loc-Wood Boat & Motors, Inc. v. Rockwell*, 245 F.2d 306 (8th Cir. 1957).

In this case, as the Eighth Circuit opinion points out, the jury's findings were inconclusive because the general verdict directive did not allow the jury to make specific factual findings upon which the district court could rely when granting or denying the injunction. As indicated previously, additional testimony regarding injunctive relief was heard during a separate non-jury hearing. Also, as indicated previously, Herschell Larimore, a maintenance supervisor at the JCCC, was one of those who testified outside the presence of the jury on the issue of injunctive relief. It was the petitioners who requested that Mr. Larimore testify only before the court and not before the jury for the purposes of determining injunctive relief. Thus, they can not now contend that their Seventh Amendment right to have a jury decide all issues common to both legal and equitable claims was violated.

As a result of the additional evidence heard and factual findings ascertained at the hearing regarding injunctive relief, the district court properly supplied its own factual findings on injunctive relief to supplement the jury's general verdict in this case. It is not a "fatal flaw in the reasoning of the Eighth Circuit" that a nominal damage instruction was submitted to the jury, as the petitioners contend. Because of the lack of specificity of the general verdict, as the court of appeals noted, the jury could have

found no damages, actual or nominal, and still believed the petitioners were recklessly indifferent to the health needs of the inmates. The return of the general verdict prevented the court from ascertaining the jury's specific factual findings, and, therefore, it was appropriate for the court to supply its own factual findings to supplement the jury's verdict.

In their petition at page 16, the petitioners argue that pursuant to *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962) and *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) "where a case involves a jury deciding legal claims and a court determining equitable ones, any factual issues central to both claims must be tried to the jury first so that the parties' Seventh Amendment jury trial rights are not foreclosed on common factual issues." This argument must fail because the petitioners waived the right to have all common factual issues heard by the jury when they waived that right during trial and allowed the judge to hear additional evidence as to injunctive relief only outside the presence of the jury.

In addition to the above argument and not waiving that position, no Seventh Amendment argument can be raised with respect to the maintenance supervisors and JCCC officials who were the subject of the directed verdict in their favor prior to the jury's verdict. The jury did not decide whether or not these defendants committed a constitutional violation, and neither did the judge. The judge directed the verdict specifically as to damages only. This allowed the judge to enter injunctive relief as to these defendants subsequent to the jury trial on the basis of the risk of future harm and based on the evidence heard outside the presence of the jury. It is obvious from the court's order of October 30, 1990 (attached to the Petition at A-17) that it was always the intent of the court to consider injunctive relief despite its directed verdict.

The petitioners admit in their petition that the defendants who were directed out of the case, and their successors, are "the

primary target of the mandatory, permanent injunction even though the claims were not submitted to the jury" (Petition, p. 20). This negates the entire argument that the judge entered an order in conflict with the jury's verdict and in violation of the Seventh Amendment because the jury did not decide the merits of the causes of action against defendants Armontrout, Moore, Lombardi, Wieburg, Gately, Hanauer, Borghart, Bauman, and Neal, who are the primary targets of the injunction. Thus, there exists no violation of the Seventh Amendment in this case.

CONCLUSION

The petitioners have not alleged or presented supportable arguments for any issues that would make this case one that should be accepted by this Court for review because the decision is not in conflict with other circuits or this Court, and does not present an important question of federal law which should be settled by this Court. For this reason and the foregoing reasons, the petition for writ of certiorari should not be granted.

Respectfully submitted,

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